IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR.

:: J U D G M E N T ::

D.B. CIVIL SPECIAL APPEAL(W)NO.726/2004

Prabhash Narain Mathur & Anr.
Vs.
State Bank of Bikaner & Jaipur & Ors.

DATE OF JUDGMENT :: 24-09-2007

:: P R E S E N T ::

HON'BLE THE CHIEF JUSTICE SHRI J.M. PANCHAL
HON'BLE SHRI JUSTICE BHANWAROO KHAN

Mr. Dinesh Mehta,, for the appellants.
Mr. O.P. Pungalia, for the respondents.

PER HON'BLE THE CHIEF JUSTICE MR. J.M. PANCHAL

The instant appeal is directed against the judgment dated October 18, 2004 rendered by the learned Single Judge in S.B. Civil Writ Petition no.4527/2004 by which the prayers made by the appellants (a) to issue an appropriate writ or order to quash notice dated September 14, 2004 issued by the State Bank of Bikaner and Jaipur under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('the Act', for short) read with Rule 9 of the Security Interest(Enforcement)Rules, 2002 for taking possession of the property of the appellant and (b) to restrain the respondents from adopting recovery proceedings against the appellants without first recovering the amount of loan from the principal borrower, are refused.

The appellants are resident of Jodhpur city and have a residential house which is situated at D-1, Vardhman Nagar, Golf Course, Jodhpur. A loan was advanced by State Bank of Bikaner & Jaipur to M/s. Shree Electrovision Pvt. Ltd., Ratanada. The appellants furnished personal guarantee and residential house of the appellants mentioned above was mortgaged with the respondent-bank. The borrower did not repay the loan amount. Therefore the respondent-bank issued notice to the appellants in exercise of powers conferred under Section 13(4) of the Act and Rule 9 of the Security Interest (Enforcement)Rules, 2002 for taking possession of the property mortgaged. The case of the appellants is that no recovery proceedings were initiated by the respondent-bank against the principal borrower, and therefore the issuance of notice was bad in law. Under the circumstances, the appellants invoked extra ordinary jurisdiction of this Court under Article 226 of the Constitution by filing S.B. Civil Writ petition no.4527/2004 and claimed the reliefs referred to earlier.

The learned Single Judge after hearing the learned counsel for the appellants was of the view that the statutory remedy of appeal was available to the appellants under the provisions of the Act for challenging the notice, and therefore the writ petition was not maintainable. In view of the said conclusion, the learned Single Judge has dismissed the petition filed by the appellants vide order dated October 18, 2004 giving rise to the instant appeal.

Mr. Dinesh Mehta, learned counsel for the appellants contented that a bare reading of the

provisions of sub-sections (2), (3) and (4) of Section 13 of the Act would indicate that proceedings under Section 13 can be initiated only against the principal borrower but not against the guarantor inasmuch as the legislation has consciously used the word 'borrower' in all the provisions, and therefore as the notice issued by the respondent-bank was without jurisdiction, the learned Single Judge should not have non-suited the appellants on the ground that statutory, alternative, effective remedy was available to the appellants.

It was argued that a secured creditor cannot proceed against the guarantor without first taking any measures specified in Clause (a) to (d) of sub-section (4) in relation to the secured assets under the Act, and therefore the notice which was issued without jurisdiction should have been quashed by the learned Single Judge. What was maintained by the learned counsel for the appellants was that it was incumbent upon the respondent-bank on the principles of fair play and equity to proceed against the principal borrower first and then to proceed against the appellants who were guarantors if any amount remained outstanding and as the action of the bank was against the principles of fair play and equity, the reliefs claimed in the petition should have been granted. It was argued that even otherwise, the judgment of the learned Single judge is contrary to the scheme envisaged under the Act, and therefore should be set aside.

Mr. O.P. Pungalia, learned counsel for the respondents contended that in view of the provisions of Section 13(11) of the Act, the action of the bank

in issuing notice for taking possession of the property mortgaged with the bank, cannot be said to be without jurisdiction, and therefore, the appeal which has no substance should not be entertained by the Court.

This Court has heard the learned counsel for the parties and considered the documents forming part of the petition.

Before the learned counsel for the appellants started the arguments, it was pointed out that having regard to the facts of the case, the appellants should resort to the alternative remedy contemplated under the Act. However, it was pointed out by the learned counsel for the appellants that the appellants are not able to comply with the requirement of depositing 50% of the amount with the appellate authority, and therefore the matter should be heard on merits of the case. Under the circumstances, this Court has considered the merits of the case.

The plea that proceedings under Section 13 can be initiated only against the principal borrower and not against the guarantor or that the secured creditor cannot proceed against the guarantor without first taking appropriate measures against the principal borrower, has no substance and cannot be accepted. Section 2(f) defines the word 'borrower' which reads as under:-

> “2(f).-borrower means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a

> person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance."

Section 13 relates to enforcement of security interest and enumerates the steps to be taken by the secured creditor in order to enable him to recover the amount of loan. Sub-section (11) of Section 13 which is important for deciding the points raised in the instant appeal reads as under:-

> "Without prejudice to the rights conferred on the secured creditor under or by this section, secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act."

A bare perusal of the above-quoted provision makes it clear that sub-section (11) of Section 13 is without prejudice to the rights conferred on the secured creditor against the principal borrower. It inter alia provides that without prejudice to the rights conferred on the secured creditor under or by Section 13, the secured creditor shall be entitled to proceed against the guarantors for recovery of the due amount. It further provides that the secured creditor is entitled to sell the pledged assets without first taking any of the measures specified in Clauses (a) to (d) of sub-section (4) in relation to the secured assets under the Act which means that it is not necessary for the secured creditor first to take action against the principal borrower and wait for action to be taken against the guarantor as is suggested by the learned counsel for the appellants.

At this stage, it would be relevant to notice that Clauses (a) to (d) of sub-section (4) of Section 13 inter alia provide that in case the borrower fails to discharge his liability in full, the secured creditor may take recourse to one or more measures indicated in Clauses (a) to (d) of the said sub-section which includes taking possession of the secured assets of the borrower, etc.

As far as the facts of the instant case are concerned, it is not in dispute that the appellants were parties to the agreement of loan which was executed between the respondent-bank and the principal borrower. It is also not in dispute that they had mortgaged the residential house with the respondent-bank. Therefore, in terms of sub-section (11) of Section 13, it is always open to the secured creditor to take any of the measures specified in Clauses (a) to (d) of sub-section (4) of Section 13 without first taking any of the measures against the principal borrower. If the arguments advanced at the Bar by the learned counsel for the appellants are accepted, it would render the provisions of the Act nugatory. The objects and reasons of the Act would indicate that it enables the bank and financial institutions to realise long-term assets, manage problems of liquidity, asset liability mis-match and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery of reconstruction. The acceptance of arguments would defeat the purpose of the objects for which the Act has been enacted. Such a course is not permissible. Under the circumstances, this Court is of the firm opinion that issuance of notice which was impugned by the appellants in the petition cannot be

considered to be without jurisdiction at all. The respondent-bank was within its rights in issuing the said notice to the appellants for taking over possession of the property mortgaged.

It may be mentioned that before passing of the Act of 2002, the banks and financial institutions in India had no power to take possession of securities and sell them. In order to overcome this deficiency, the Act has been enacted. The action which is initiated by the respondent-bank against the appellants cannot be said to be contrary to fair play and equity nor it is demonstrated to be arbitrary or unjust. Therefore, the learned Single Judge was justified in not granting the reliefs claimed in the petition. No ground is made out by the appellants to interfere with the impugned order and therefore the appeal which lacks merit, deserves dismissal.

For the foregoing reasons, the appeal fails and is dismissed.

[BHANWAROO KHAN],J. [J.M.PANCHAL],.CJ.

Praveen